EX PARTE OR LATE FILED

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

MOTION TO ACCEPT LATE-FILED OPPOSITION

The Joint Parties,[1] pursuant to sections 1.3 and 1.45 of the Commission's rules, hereby move that the Commission accept for filing in the captioned docket the attached Opposition of the Joint Parties to Petitions for Reconsideration, which the Joint Parties sought to file on July 15, 1996.

As a result of unforeseen difficulties, final production of the Joint Parties' Opposition in the offices of Bell Atlantic was delayed until after 5:00 on July 15. Although Bell Atlantic's paralegal made a heroic effort to file the Opposition before the deadline, he reached the Commission's offices at 5:32 p.m. As a result, he was unable to file the Opposition.

In light of their good-faith effort to make a timely filing, the Joint Parties respectfully request that the Commission accept the attached Opposition for filing nunc pro tunc. Because the Commission has previously ordered that there will be no replies to oppositions in this

[1] The Joint Parties are the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications Inc. and Southwestern Bell Telephone Company.

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matter,[2] no party will be disadvantaged as a result. In addition, the public interest will be served by allowing the Commission the fullest consideration of all issues raised in the Petitions.

In the alternative, if the Commission declines to accept the Opposition as requested, the Joint Parties move that the Commission accept the attached Opposition as a written ex parte in the captioned docket for inclusion in the public record

Respectfully submitted,

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on behalf of the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications Inc. and Southwestern Bell Telephone Company

[2] 61 Fed. Reg. 32706 (June 25, 1996).

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In the Matter of	)	
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Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
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Open Video Systems	)	

OPPOSITION OF THE JOINT PARTIES[1] TO PETITIONS FOR RECONSIDERATION

[1] The Joint Parties are the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications Inc. and Southwestern Bell Telephone Company.

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SUMMARY

The Commission has crafted an Order that, overall, implements Congress' intent to encourage competition in the provision of video programming by establishing a delivery option subject to reduced regulatory burdens. The Commission has avoided the pitfalls of trying to resolve every hypothetical issue up front and instead has appropriately established broad guidelines that the Joint Parties hope will allow operators of open video systems (OVS) the flexibility needed to develop their systems and compete with incumbent cable operators.

A number of petitions for reconsideration simply reargue issues that the Commission has already decided. Because these petitions have not presented new information, the Joint Parties have not reargued these issues. Given the time constraint under which the Commission must act, these petitions should be rejected.

Others continue to seek to impose rules on OVS that are contrary to the 1996 Act and would undermine Congress' goal. For example, cable seeks to impose national rules concerning channel allocation policies on OVS to which cable itself is not subject. Local governmental authorities claim they should be permitted to require OVS operators to provide institutional networks, and should be permitted to regulate OVS extensively, although the 1996 Act specifically precludes such regulation. Both object to various aspects of the Commission's default mechanism with respect to PEG access. The obligations of OVS operators to provide PEG access are set out in the Act, however, and the Commission may not engraft additional obligations from which OVS operators are specifically exempted.

A few petitioners complain that the Commission inappropriately applied its program access rules to OVS and to multichannel video program distributors using OVS. Those

complaints arise from a deliberate misreading of the program access rules and strained interpretations of the Act and should be rejected.

Finally, a few other petitioners raise a collection of arguments that would result in additional rules that are contrary to the Act or would discourage local exchange companies from providing OVS. These arguments should also be rejected by the Commission.

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	)	
Open Video Systems	)	

OPPOSITION OF THE JOINT PARTIES[1] TO PETITIONS FOR RECONSIDERATION

As the Joint Parties have stated previously, the Commission's Second Report and Order ("Order") in the above-captioned docket generally is consistent with the spirit and intent of the Telecommunications Act of 1996.[2] The Commission has avoided the pitfalls of trying to resolve every hypothetical issue up front and instead has appropriately established broad guidelines that the Joint Parties hope will allow operators of open video systems (OVS) the flexibility needed to develop their systems and compete with incumbent cable operators.

Cable interests and local governmental authorities have filed a number of petitions for reconsideration. Some are unhappy with the Commission's Order and simply reargue issues the Commission decided against them. Given the limitations of time and space, the Joint Parties have not attempted to re-address arguments that have already been resolved.[3] In other instances, parties have dreamed up a parade of horribles for the Commission, imagining hypothetical issues

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[1] The Joint Parties are the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications Inc. and Southwestern Bell Telephone Company.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

[3] Attached to this Opposition as Appendix A for the Commission's reference is a list of such arguments and citations to the comments and reply comments where each argument already has been made.

that may arise and asking the Commission to establish rules to resolve them now. Those parties would lead the Commission down the path to video dialtone. As Professor Hazlett explained, "In the VDT rulemaking process, the Commission attempted to resolve all potential issues, whether real or hypothetical, prior to permitting any rivalry to commence. Consequently, potential competitors to monopoly cable systems were denied both the experience of real world markets in formulating business plans as well as the flexibility to quickly adjust such plans in response to changing technology and observed consumer demands."[4] The Commission has appropriately chosen another road for OVS, and should not turn back now.

A few issues raised in the petitions for reconsideration require a response. They are addressed below.

I. Efforts Of The Cable Industry To Undermine The Competitive Viability Of OVS Should Be Rejected.

Cable interests, in general, continue their efforts to have the Commission impose detailed and onerous rules on OVS. For example, NCTA argues that the Commission should set national rules governing how OVS operators must allocate channel capacity, because leaving the determination to OVS operators "will likely raise unaffiliated programmers' costs of doing business."[5] Aside from the fact that this argument, like others, simply repeats claims the Commission already has rejected, *see* Appendix A, it is instructive because it is typical of the flaws underlying cable's approach to OVS.

First, it is a red herring. The primary outlet for programming at this time is cable. Programmers, therefore, must deal with a multitude of cable operators throughout the country

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[4] Hazlett ex parte at 3.

[5] NCTA Petition for Reconsideration ("NCTA") at 17.

who have different practices and policies. Accommodating that multiplicity is already a cost of doing business for programmers; there is no reason to believe that dealing with OVS would be substantially more burdensome.

Moreover, cable seeks to impose rules on OVS to which cable itself is not subject. As just noted, programmers already deal with a multiplicity of cable operators in getting their product distributed, yet the cable interests have not suggested that they be subject to national rules to reduce programmers' costs of doing business. In addition, cable ignores the variety of technologies and architectures that may be used to provide OVS. Requiring OVS operators to conform to national rules could impose inefficiencies on OVS that would impede its ability to compete with cable.

II. The Local Governments' Attempts To Rewrite The Act In The Guise Of Reconsideration Should Be Rejected.

A. Institutional Networks

Some petitioners contend that the Commission erred in holding that "Section 611 does not specifically authorize local franchising authorities to require cable operators to build institutional networks."[6] Accordingly, they argue that the Commission also erred in not requiring OVS operators to provide institutional networks as part of their PEG obligations.[7] These petitioners misconstrue Section 611(b) and Section 621(b)(3)(D).

The issue is not whether local franchising authorities have the right to require a cable operator to provide an institutional network as a condition of granting, renewing, or transferring a

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[6] Order, ¶143.

[7] Petition for Reconsideration of Michigan, Illinois, And Texas Communities ("MIT Communities") at 10 *et seq.*; Petition for Reconsideration of National League of Cities ("NLC") at 15-16; Petition for Reconsideration of Alliance for Community Media, et al. at 7-8. *See also* Petition for Reconsideration of City of Indianapolis at 2 ("[T]he FCC needs to clarify what an Institutional Network is.")

cable franchise or whether institutional networks are useful to local franchising authorities.[8] The issue is whether that right is derived from Section 611 or elsewhere. An obligation to provide institutional networks can be extended to OVS operators only if it is based on a provision of Title VI, such as Section 611, that the 1996 Act extends to OVS operators.

Section 611 is not the source of whatever right franchising authorities may have to require institutional networks. The relevant part of Section 611(b) states, "A franchising authority . . . may require . . . that . . . channel capacity on institutional networks be designated for educational or governmental use . . . ." Two pertinent conclusions are apparent from this language:

1. The language does not state that franchising authorities may require the provision of institutional networks. It assumes that cable operators may provide institutional networks and affirms that franchising authorities may require educational and governmental capacity on such networks.
2. The provision of institutional networks is not a subset of the provision of PEG capacity. Educational and governmental capacity may be provided on institutional networks, but institutional networks are not a form of PEG access. Section 611(a) makes it clear that Section 611 pertains only to "the designation or use of channel capacity for public, educational, or governmental use." Other franchise requirements, such as the provision of institutional networks, are not within the scope of Section 611.

The MIT Communities argue that, in Section 621(b)(3)(D) of the 1996 Act, "Congress made clear that franchising authorities expressly may require a cable operator to provide an

[8] *See* MIT Communities at 10-13.

institutional network as a condition of a franchise grant or a renewal."[9] Even if Section 621 permits franchising authorities to require cable operators to provide institutional networks as a condition of the cable franchise, however, it does not follow that the same requirement may be imposed on OVS operators. The PEG access obligations of OVS operators are based on Section 653(c)(2)(A), not on Section 621(b)(3)(D). Indeed, OVS operators are exempt from all requirements of Section 621.[10]

Moreover, Section 621(b)(3)(D) makes clear that any right local authorities may have to require the provision of institutional networks by cable is not derived from Section 611: "Except as otherwise permitted by Sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise." (Emphasis added.) If Section 611 allowed franchising authorities to require the provision of institutional networks, there would have been no need for Congress to mention both Section 611 and institutional networks as exceptions to the prohibition in Section 621(b)(3)(D). The separate references to Section 611 and institutional networks indicate that Congress understood that Section 611 is not the source of any right that franchising authorities may have to require cable operators to provide institutional networks. Therefore, the Commission has correctly refused to extend an institutional network obligation to OVS operators.

B. Regulation By Local Franchising Authorities

Several parties raise a variety of issues related to the regulation of OVS operators by local franchising authorities. Generally, they contend that the Commission has erred in failing to give

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[9] MIT Communities at 16.

[10] 1996 Act §653(c)(1)(C).

local franchising authorities sufficient regulatory authority over OVS operators. They contend, for instance, that the Commission has not given local authorities sufficient control of public rights-of-way.[11] They argue that they have a right to impose a "non-Title VI" franchise requirement on OVS operators.[12] They also argue that they are entitled to greater "compensation" for the use of public rights-of-way than the Commission has allowed.[13] They argue for the right to extend consumer protection and customer service requirements of cable franchises to OVS operators.[14]

In each case, these parties attempt to extend to OVS the same degree of regulatory control that Congress has permitted local franchising authorities to exercise over cable service. These parties forget that both cable service and OVS are activities in interstate commerce, over which Congress is supreme.[15] While Congress has permitted extensive local regulation of cable service,[16] it has refused to permit the same local regulation of OVS. It has limited local authority over OVS operators to nondiscriminatory and competitively neutral management of public rights-of-way.[17] It also has prescribed the "compensation" that local authorities may receive for the use of public rights-of-way.[18] It has refused to extend the consumer protection and customer

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[11] NLC at 12 *et seq.*

[12] NLC at 3 *et seq.*

[13] NLC at 4 *et seq.* NLC argues that OVS will impose "massive costs" on local governments associated with OVS construction activity. NLC at 9. NLC does not explain, however, why those costs are different than the costs that other users of public rights-of-way impose or why regulations applied in a nondiscriminatory, competitively neutral manner to all users of public rights-of-way are insufficient to deal with such matters.

[14] City of Indianapolis at 2.

[15] Authority over rights-of-way clearly does not entitle state or local governments, in the absence of specific authorization by Congress, to promulgate regulations or levy taxes that discriminate against or unduly burden interstate commerce--even though such regulations relate to the use of public rights-of-way. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, *reh'g denied*, 430 U.S. 976 (1977).

[16] See *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.")

[17] See 1996 Act, §253(c)(2)

[18] 1996 Act, §653(c)(2)(B)

service requirements of the Cable Act to OVS.[19] The Commission may not authorize local franchising authorities to regulate OVS contrary to Congress' direction.

One party representing local franchising authorities argues that they should be permitted to extend telephone franchise requirements to OVS operators.[20] It is somewhat ironic that representatives of local franchising authorities have previously argued that telephone franchises are not broad enough to permit telephone companies to use public rights-of-way for OVS.[21] The Joint Parties do not object to administratively efficient means of managing the use of rights-of-way in a nondiscriminatory and competitively neutral manner. Indeed, the Joint Parties have previously indicated that whether existing rights-of-way agreements cover OVS is a matter between the LEC and the local government or owners of private property over which the LEC has obtained easements.[22] Whatever method is used to administer rights-of-way, however, must not discriminate between OVS and other users of the rights-of-way.

C. PEG Access

Several parties object to the Commission's "default mechanism for establishing PEG obligations."[23] Cable operators object to that part of the mechanism that permits OVS operators to satisfy PEG obligations by "connection to the cable operator's PEG access channel feeds."[24] These parties characterize the Commission's action as the imposition of "interconnection" requirements on cable operators and assert that this requirement is a form of common carrier regulation. They are wrong.

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19 1996 Act, §653(c)(1)(C).

20 Petition for Reconsideration of Municipal Administrative Services ("MAS") at 4.

21 Comments of National League of Cities, filed April 1, 1996, at 67-69

22 Petition of the Joint Parties for Clarification or Reconsideration at 10.

23 Order ¶141.

24 NCTA at 16; Petition for Reconsideration of Comcast Cable Communications, Inc. ("Comcast") at 4.

The Commission has not required that the cable operators' networks carry the signals of OVS operators. Moreover, although the rule is phrased as a requirement on cable operators,[25] it is more properly understood as a precondition to OVS operators' obligation to provide PEG access: Unless OVS operators have access to existing PEG programming feeds, they should have no obligation to carry PEG programming. Otherwise, their obligation would be expanded beyond the scope of section 611 to include responsibility for enabling the creation of new PEG programming. Section 611 imposes only the obligation to provide capacity for PEG programming equivalent to what the incumbent cable operator provides. If cable operators and local franchising authorities want OVS operators to bear the same PEG capacity burden that cable operators bear, they must cooperate, as necessary, in providing access to existing PEG programming feeds. The Commission should rephrase the rule to eliminate cable operators' opportunity to raise this spurious objection.

Cable operators and local franchising authorities also object to that portion of the default mechanism that permits OVS operators to share "costs directly related to supporting PEG access, including costs of PEG equipment and facilities."[26] This objection is possible only because of the Commission's erroneous interpretation of Section 653(c)'s PEG access requirement to include the provision of "services, facilities or equipment which relate to PEG use of channel capacity."[27] Section 653(c) extends only the obligations of Section 611 to OVS operators and Section 611 is limited to the provision of channel capacity for PEG. The authority of franchising

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25 §76.1505(d)(3).

26 Order, ¶141.

27 Order, ¶142.

authorities to require related "services, facilities or equipment" is derived from Section 621, not Section 611.[28]

The Commission reached its erroneous conclusion by misinterpreting the legislative history. The Commission based its interpretation on language found in the Conference Report--a reference to "capacity, services, facilities and equipment."[29] That reference related, however, not to the Conference Report's explanation of the 1996 Act but to the explanation of H.R. 1555, which would have explicitly required OVS operators' to provide "capacity, services, facilities and equipment for public, educational, and governmental use."[30] That language was not carried over into the 1996 Act and thus provides no basis for interpreting the 1996 Act to require any more than the provision of PEG access capacity as specified in Section 611. Therefore, the Commission should eliminate the requirement for OVS to share in the costs of facilities or equipment for PEG.

NCTA and Comcast argue that the Commission's default mechanism for PEG access -- requiring cable operators to share their PEG feeds with OVS operators -- relieves OVS operators of their burden to negotiate with local franchising authorities and therefore does not meet the Act's requirement that the obligations on OVS be "no greater or lesser" than those on cable.[31] Comcast and NCTA are wrong.[32] It is not the Commission's default mechanism that relieves OVS operators of a requirement to negotiate with local franchising authorities, but the 1996 Act

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28 As previously discussed, §621 does not apply to OVS operators.

29 Order, ¶142.

30 H.R. No. 104-204, 104th Cong., 1st Sess., pt. 1, §656(B)(1) at 199 (1995).

31 Comcast at 4; NCTA at 16.

32 Even if OVS operators were required to duplicate incumbent cable operators' PEG requirements rather than share the feed, OVS operators would still not need to negotiate with local franchising authorities: in that case, the PEG access requirement also would have been set by the incumbent cable operator in its negotiations with the local franchising authority.

itself. Because the Act provides that OVS operators do not need to obtain a franchise,[33] they have no requirement to negotiate with local franchising authorities about what such a franchise would look like. Instead, the Act requires that OVS operators provide PEG access equivalent to what the incumbent cable operator provides.[34]

III. The Commission's Order Applying The Program Access Rules To OVS Will Help Make Real Competition With Cable Possible.

Rainbow and NCTA argue that the Commission should not extend the program access rules to "OVS video programming providers."[35] The Commission has already considered and rejected these arguments.[36] Moreover, NCTA's and Rainbow's arguments are based on a deliberate misreading of the program access rules and strained interpretations of the Act.

NCTA and Rainbow both claim that the 1996 Act applies the program access rules only to the "OVS operator."[37] It is true that the Act requires that OVS operators, like cable operators, be subject to the program access rules, and the Commission's Order implements that requirement.[38] Rainbow's and NCTA's focus on section 653, however, is an attempt to deflect attention from section 628 of the 1992 Cable Act.[39] Section 628 applies to multichannel video programming distributors (MVPDs).[40] The Commission appropriately addressed the question of

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33 1996 Act, §653(c)(1)(C).

34 *Id.*, §§653(c)(1)(B); 653(c)(2)(A).

35 Petition for Reconsideration of Rainbow Programming Holdings, Inc. ("Rainbow") at 4. *See also* NCTA at 10-13 (the Commission's Order "impermissibly extends the exclusivity provisions of Section 628 to OVS packagers") (emphasis in original).

36 Order, ¶182.

37 Rainbow at 4; NCTA at 10.

38 Order, ¶¶ 175-180.

39 Moreover, Rainbow and NCTA ignore §628(j) which provides that "Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers." (emphasis added.)

40 Indeed, throughout its Petition, Rainbow goes to great lengths to avoid the term multichannel video programming distributor, or MVPD, instead using the term "video programming provider," in an effort to claim that MVPDs using OVS are not MVPDs for purposes of the program access rules.

how the program access rules apply in the OVS context, and explained in some detail how both the burdens and benefits that flow from the rules would apply to such MVPDs that use OVS.[41]

Finally, Rainbow argues as a policy matter that "extending" the program access rules to OVS will impede competition between MVPDs on the open video system. According to Rainbow, "the Congressional OVS framework" is that "video programmers are supposed to compete on equal terms."[42] The Joint Parties have explained before that Congress' primary goal in enacting the OVS provisions was to encourage competition with incumbent cable providers.[43] Such competition will be impossible if OVS-affiliated programmers are denied access to key programming. The Commission's Order gets it right; in applying program access rules to MVPDs using open video systems, it takes important steps to ensure that competition between programmers will occur on equal terms.

IV. The Commission Should Reject Requests To Impose Other Inappropriate Regulations On OVS.

The Sports Leagues argue that OVS operators should be required to ensure compliance with sports exclusivity rules, and that notice to the program supplier and taking steps to stop distribution should not excuse the operator from sanctions.[44] The Leagues also argue that the operator should be required to notify the program supplier on the same day it receives notice from the team or league. That argument, however, serves to demonstrate why the Commission

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41 Order, ¶¶ 181-196.

42 Rainbow at 13. Rainbow claims that telephone companies "stymied" its efforts to provide programming on video dialtone systems and cites Bell Atlantic's Dover Township system in particular. Rainbow at 11 and n. 28. Rainbow has previously raised the same claims, and Bell Atlantic has already rebutted them. *Amendment to The Bell Atlantic Telephone Companies Tariff FCC No. 10; Video Dialtone Service*, Transmittal Nos. 741, 786 Amended, CC Docket No. 95-145, Reply of Bell Atlantic to Comments and Oppositions Concerning Direct Case, filed December 20, 1995 at 23-28 and 31 n. 81

43 Joint Parties Comments at 3

44 Petition for Reconsideration of the Office of the Commissioner of Baseball, National Basketball Association, National Football League and National Hockey League ("Sports Leagues") at 3.

should grant US West's request for clarification that the obligation for compliance with sports exclusivity, syndicated exclusivity, and network non-duplication lies with the programmer.[45] The OVS operator should not be required to put itself in the middle of a dispute between the programmer and the party claiming rights under these requirements. If the operator complies with the programmer's directions, it risks liability to the third party; if it complies with the third party's directions, it risks liability to the programmer Where the operator is not the programmer, it is, in essence, a passive carrier, and the obligation for complying with the Commission's rules in these areas should rest with the programmer

MCI claims that OVS operators will initially offer carriage on the OVS to unaffiliated programmers at subsidized rates and then, once a third of the capacity is taken, will set rates for the remaining channels at discriminatorily high rates.[46] To prevent this, MCI argues that parties other than programmers who sought carriage on the OVS should be able to file complaints about OVS rates, that LECs should be required to charge rates in excess of the incremental cost of providing video service, and that LECs "seeking OVS status" should be required "to publicly file incremental and stand alone telephone and video cost studies, along with appropriate subscriber and usage data as part of their OVS applications."[47] MCI's claims are its second attempt to impose Title II-like regulation on OVS, and the Commission should again reject these arguments.[48]

First, the premise for MCI's argument is farfetched. There is no possibility that an OVS operator who charges one group of programmers below cost rates, and then seeks to charge

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45 Petition for Reconsideration of US West at 4-5.

46 MCI Petition for Reconsideration at 3, 4.

47 MCI at 6.

48 *See* Order at ¶120.

another programmer a discriminatorily high rate, will escape detection by the Commission when it compares the latter programmer's rate to the weighted average rate of the first group.

Moreover, the requirements MCI asks the Commission to impose would resurrect the Title II regulation that applied to video dialtone, contrary to Congress' explicit direction.[49] Allowing parties other than programmers who have sought carriage to challenge OVS carriage rates, requiring the production of stand alone cost studies for telephony and video, and mandating that rates be set at a particular level above incremental cost would, in essence, recreate the type of tariff proceedings that the Commission conducted under video dialtone.

Indeed, MCI's request that OVS operators provide stand alone costs for telephony and video goes beyond anything required under video dialtone or traditional Title II telephony regulation. Moreover, MCI's argument that the telephone companies should provide subscriber and usage data for video at the time they seek OVS certification -- before they are permitted to operate the system -- merely emphasizes the regulatory gamesmanship underlying its claims.

ESPN raises concerns that the Commission's rules with respect to shared channels or joint marketing/co-packaging of programming might undermine program providers' copyright protections.[50] The Commission's rules do not, and could not, alter the copyright laws. Indeed, the Joint Parties' comments made clear that any programmer who wished to provide programming that was to be carried on a shared channel was expected to have the appropriate permission to do so.[51] Similarly, to the extent that a programmer wishes to enter into a co-

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49 1996 Act, §302(b)(3); Joint Explanatory Statement at 178-79.

50 ESPN at 3

51 Joint Parties' Comments at 24; Reply Comments at 12

packaging arrangement, it would have an obligation to ensure that any copyright or trademark restrictions to which it is subject are not violated by such an arrangement.

One aspect of ESPN's claim, however, is ambiguous. ESPN appears to argue that a program service not only must give permission to be carried by each programmer who wishes to include the program in its line-up, but also must give each such programmer permission to carry the programming on a shared channel.[52] Such a requirement would give program services veto power over an OVS operator's decision to use shared channels, contrary to the plain language of the Act.[53]

ALTV argues that the Commission should "state a 'zero tolerance' policy for widespread carriage of local signals beyond their local market areas on open video systems which span multiple television markets."[54] According to ALTV, OVS operators could configure their systems to undermine the operation of the must carry and retransmission consent rules.[55] As the Joint Parties stated in their Petition for Clarification or Reconsideration, in order to construct cost-effective and efficient distribution networks, OVS build-outs typically will mirror existing telephone network designs.[56] Network efficiencies will drive open video system configurations, not attempts to game the must-carry/retransmission consent rules. Moreover, a variety of technologies may be used to provide OVS. Those technologies may well provide OVS operators the ability to distribute programming within limited geographic areas, even if the open video system covers a broader area. As a result, the Commission should not adopt a rule that would

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52 ESPN at 2-3.

53 1996 Act, §653(b)(1)(C).

54 Petition for Reconsideration of ALTV at 1

55 *Id.* at 2.

56 Joint Parties at 14.

force LECs to build inefficient video distribution networks -- such systems simply will not get built.

Conclusion

The Commission has crafted an Order that, overall, implements Congress' intent to encourage competition in the provision of video programming by establishing a delivery option subject to reduced regulatory burdens. The Commission should reject the attempts by cable, local governmental authorities, and others to impose new regulatory burdens that are contrary to the Act and would undermine Congress' intent

Respectfully submitted.

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ISSUES PREVIOUSLY RAISED

ISSUE 1: Incumbent Cable Operators Are Entitled To Carriage On OVS

Cox Comments at 2-3 and Reply Comments at 3 et.seq. especially 7
NCTA Comments at 27, 29-30
Time Warner Comments at 27

ISSUE 2: The Commission Should Establish Rules To Prescribe Channel Allocation and Positioning Methods Rather Than Leaving Such Decisions To The OVS Operator

NCTA Comments at 3, 11, 13-14 and Reply Comments at 7-9
California Public Utilities Commission Comments at 7
TCI Comments at 13-14
Motion Picture Association of America, Inc. Comments at 4-6
American Cable Comments at 16-18, 19-20

ISSUE 3: OVS Operators Should Be Required To Charge Uniform Carriage Rates Unless Differences Can Be Justified

NCTA Comments at 19 and Reply Comments at 17

ISSUE 4: OVS Operators Should Be Required To Share Local "Ad Avails" On Shared Channels

Continental Comments at 13

ISSUE 5: Incumbent LECs Should Be Required, On Inbound Telemarketing Calls, To Advise Consumers Of Alternative Video Providers

Time Warner Comments at 17-18
Continental Comments at 15
NCTA Comments at 25
Adelphia Reply Comments at 8
Alliance for Community Media Reply Comments at 12

ISSUE 6: LECs Should Not Be Allowed To Bundle OVS With Local Telephone Service Until They Meet The Legislative Requirements To Allow Local Competition

Comcast Comments at 9
AT&T Comments at 2 and Reply Comments (whole pleading)
Time Warner Comments at 17
Cox Comments at 2, 9 and Reply Comments at 11
Adelphia Reply Comments at 8